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In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OHIO, PETITIONER

v.

WILLIAM LEE KOVACS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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INTEREST OF THE UNITED STATES

This case presents the substantial question whether the automatic stay provisions of the Bankruptcy Reform Act, 11 U.S.C. 362, operate to block the effective implementation of mandatory injunctions obtained in governmental environmental suits against defendants who later file for bankruptcy. Here, an industrial waste disposer successfully invoked the automatic stay to prevent the State of Ohio from enforcing a state court order requiring the polluter, who had failed to comply with an earlier cleanup order, to release certain of his assets and future in-

come to a court-appointed receiver who, in turn, was directed to effect the cleanup. That problem equally arises when the United States seeks to enforce cleanup obligations imposed by federal law, including the Safe Drinking Water Act ("SDWA"), 42 U.S.C. 300f *et seq.*, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901 *et seq.*, and the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9601 *et seq.*

We have cause for concern that the decision below may be used to cripple our own environmental enforcement efforts. Already, Kovacs himself has invoked the Sixth Circuit decision to frustrate a federal action pending against him. At least one district court has refused to vacate a stay against an ongoing federal action in pursuit of an injunction that would order the defendant-debtor to abate the health hazard created by its disposal of asbestos wastes. *United States* v. *Johns-Manville Sales Corp.*, Bankr. No. 81-299-D (D.N.H. Nov. 15, 1982).[1] Furthermore, even as it bears on local enforcement efforts, the present decision implicates the national commitment to a safer environment by encouraging offenders to file for bankruptcy and thereby excuse themselves from performing orders which require them to abate the health hazards they have created.

STATEMENT

1. Prior to filing a petition in bankruptcy, the debtor, William Kovacs, had been engaged in the business of industrial waste disposal in Ohio. In 1979 the State of Ohio sued Kovacs as an individual

[1] See also *In re Penn Terra Limited*, Bankr. No. 82-845 (W.D. Pa. Nov. 4, 1982).

and as the officer of several business entities, including the Chem-Dyne Corporation, for alleged violations of various state environmental laws. At that time, Kovacs signed a stipulation and judgment entry in the Butler County Common Pleas Court. That order prohibited him from causing further pollution, required him to remove all hazardous wastes from the premises of the Chem-Dyne Corporation by July 1980, and directed him to pay $75,000 to the Ohio Department of Natural Resources. Pet. App. G. Due to Kovacs' failure to comply, the state court appointed a receiver to collect Kovacs' non-exempt assets and use them to finance the cost of cleanup at the Chem-Dyne site.[2] Pet. App. E. Subsequently in July 1980, Kovacs filed a personal petition in bankruptcy in the United States Bankruptcy Court for the Southern District of Ohio. *In re Kovacs*, Bankr. No. B-1-80-1499 (Oct. 31, 1980).[3]

In an effort to ensure the availability of adequate funds to implement the cleanup order, Ohio sought a state court hearing on Kovacs' current employment status and income. Kovacs thereupon moved the bankruptcy court to enjoin Ohio from proceeding in state court. He argued that the State's goal was to obtain an order permitting the state-court receiver to use his post-bankruptcy income to satisfy the unfilled

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[2] The receiver was authorized "to receive and collect any and all sums of money due or owing to the defendant business entities or defendant Kovacs in any manner, whether the same are now due or shall hereafter become due and payable." Pet. App. E at 9.

[3] His original petition sought reorganization under Chapter 11 of the Bankruptcy Code. In September 1980, the bankruptcy court converted the action to one for straight bankruptcy under Chapter 7 of the Code. See Pet. App. D at 1.

obligation to clean up the Chem-Dyne site and that such an order would violate the automatic stay provisions of 11 U.S.C. 362. The bankruptcy court agreed.

2. The bankruptcy court readily acknowledged that neither the cleanup order nor the order imposing the receivership gave the State a money judgment with respect to cleaning up the Chem-Dyne premises.[4] Nonetheless, the bankruptcy court enjoined the State from proceeding in state court "to levy on post-filing wages of the debtor." Pet. App. D at 11. It reasoned that "there is no difference in substance between efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him. We hold, therefore, that the State is estopped to deny that it is seeking to enforce a money judgment against debtor." Pet. App. D at 6.

The State appealed to the United States District Court for the Southern District of Ohio, which affirmed. Pet. App. C. The district court, too, found that the State sought to collect money "just as though it were enforcing a money judgment." Pet. App. C at 3. Accordingly, the district court held the automatic stay applicable "because the state's effort is clearly to enforce a judgment obtained before the filing of the bankruptcy petition." *Ibid.* Moreover, the district court rebuked the State for "attempting to punish Mr. Kovacs for not complying with the 1979 judgment, and, in the process, subverting the purpose of the Bankruptcy Code." *Id.* at 4. The court admonished the State to seek relief from the stay in the bankruptcy court under 11 U.S.C. 362(d). Meanwhile, if Kovacs were violating envi-

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[4] The State apparently conceded that it could not enforce that part of the 1979 order requiring Kovacs to pay the State $75,000. Pet. 2n.*

ronmental laws, the State could invoke criminal sanctions, but the "Bankruptcy Code may not be used as a substitute for such criminal sanctions." *Ibid.*

3. The Sixth Circuit affirmed, *per curiam*. 681 F.2d 454 (1982) (reproduced at Pet. App. A). It concluded that, while Section 362(b) clearly permitted governmental units to continue to enforce their police power through mandatory injunctions despite the filing of a bankruptcy petition, it denied them the power to collect money in their enforcement efforts. Pet. App. A at 6. Like the two lower courts, the Sixth Circuit also believed that Ohio had returned to state court in pursuit of what "in essence" amounted to a money judgment against Kovacs, which was "properly" subject to the automatic stay. *Ibid.* Concerned that the state court had ordered Kovacs to release all non-exempt assets, including money payable to himself in the future, the Sixth Circuit could find "little in substance to distinguish that order and a money judgment." *Id.* at 6-7. It concluded that Ohio's attempt to reach Kovacs' post-bankruptcy earnings would "subvert" the purpose of the Bankruptcy Code to rehabilitate debtors. *Id.* at 7.

DISCUSSION

The Sixth Circuit's decision effectively defeated Ohio's ability to force Kovacs to comply with a mandatory injunction designed to protect public safety. At least in principle, that holding conflicts with decisions of other courts, including the Court of Appeals for the Fifth Circuit. By propounding an expansive definition of "money judgment," the court has unduly restricted the governmental exemption to the automatic stay. See 11 U.S.C. 362(b)(5). The result is to encourage polluters to abuse the Bankruptcy

Code and defy state and federal environmental protection laws. Accordingly, we join Ohio in urging the Court to review this important question.

1. So far as relevant here, governmental litigation is wholly or partially exempt from the automatic stay provision of the Bankruptcy Act when the suit implements the government's police or regulatory power. For purposes of 11 U.S.C. 362(b)(4), it matters not what relief is sought: the governmental unit may commence or continue any police or regulatory action. Subsection (b)(5), on the other hand, specifies which judgments the government may not then seek to execute. In the present case, there is no doubt that the order was obtained pursuant to an exercise of Ohio's police or regulatory powers. The legislative history is unambiguous that the automatic stay provisions do not apply to halt the commencement and continuation of environmental protection actions.[5] The only question is whether the state court order sought to be enforced is a "money judgment" which cannot be executed without leave from the bankruptcy court.[6]

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[5] H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 343 (1978):

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, *environmental protection*, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. [Emphasis added.]

See also S. Rep. No. 95-989, 95th Cong., 2d Sess. 52 (1978).

[6] Once a petition in bankruptcy is filed, the bankruptcy court acquires exclusive jurisdiction over the debtor's property, wherever it may be located. 28 U.S.C. 1471(e).

Neither the Bankruptcy Code nor its legislative history specifically defines the term "money judgment." Congress did, however, explain that subsection (b)(5) excluded money judgments from the governmental exemption in order to prevent the government from receiving preferential treatment at the expense of the other creditors.[7] Obviously, when the government's interest in executing a judgment is strictly pecuniary, then its interest is identical to that of other creditors. The government's interest would be predominantly pecuniary, for example, when it seeks to collect a penalty or fine imposed upon the debtor for a statutory violation. In that case, there is no justification for granting the government preferential treatment.[8] By the same token, when the thrust of the government's action is not to collect money from the debtor but rather to protect the public health and safety, then the government does not stand in the shoes of an ordinary creditor. In applying the exemption to a given judgment, the court must initially scrutinize the governmental interest. The mere fact that the judgment

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[7] H.R. Rep. No. 95-595, *supra*, at 343:

> Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

See also S. Rep. No. 95-989, *supra*, at 52.

[8] A governmental penalty or fine may, however, survive the bankruptcy discharge under 11 U.S.C. 523(a)(7).

entails the expenditure of money does not automatically remove it from the (b)(5) exemption.[9]

2. Many injunctions entail the expenditure of money for their performance. See *United States* v. *Charles Price*, 688 F.2d 204, 213 (3d Cir. 1982).[10] A defendant may be ordered to fund a study to determine the extent of the threat posed by its waste disposal practices, *e.g.*, *Price;* to remove leaking drums of toxic wastes that threaten groundwater contamination, *e.g.*, *Kovacs;* to remove industrial wastes previously deposited in navigable waters, *e.g.*, *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 490-493 (1960); to operate its plant in compliance with environmental regulations, *e.g.*, *Commonwealth* v. *Peggs Run Coal*, 423 A.2d 765 (Commw. Ct. Pa. 1980). In each case, when the government seeks to enforce the order, its foremost aim is to protect the public health, not to enhance the public fisc.

In the *Price* case, the Third Circuit faulted the district court for adopting an unduly restrictive view

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[9] The Code defines "claim" as the "right to payment, whether * * * liquidated [or] unliquidated, * * * legal [or] equitable * * *." 11 U.S.C. 101(4)(A). The fact that this definition is broad does not mean that money judgments necessarily include the "equitable" right to payment. Even if it did, the relief Ohio sought did not constitute a "money judgment" excluded from the Section (b)(5) exemption; for, Ohio's claim was not to be paid but to require that Kovacs spend whatever amount was necessary to remove the hazardous wastes.

[10] See *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 290-291 (1960) (when the public interest is involved, a court may fashion any necessary, equitable relief, including the payment of money); *Porter* v. *Warner Co.*, 328 U.S. 395 (1946) (exercising its equitable jurisdiction, this Court ordered defendants to repay illegally collected rents under the Emergency Price Control Act).

of its equitable remedial powers in the context of environmental protection. 688 F.2d at 211. The federal government had requested funds to conduct a diagnostic study of the threat posed by a hazardous waste landfill. The district court denied the request, believing it an attempt to transform a claim for damages into an equitable action. The Third Circuit disagreed (*id.* at 212):

> Damages are awarded as a form of substitutional redress. They are intended to compensate a party for an injury suffered or other loss. A request for funds for a diagnostic study of the public health threat posed by the continuing contamination and its abatement is not, in any sense, a traditional form of damages. The funding of a diagnostic study in the present case, though it would require monetary payments, would be preventive rather than compensatory. The study is intended to be the first step in the remedial process of abating an existing but growing toxic hazard which, if left unchecked, will result in even graver future injury, i.e., the contamination of Atlantic City's water supply.[11]

Similarly, in the present case, the state court's orders were preventive, not compensatory. Initially, the court ordered Kovacs himself to clean up the dumpsite. Only subsequently, upon the State's showing that Kovacs had not complied, did the court order Kovacs to release certain assets and future earnings to the court-appointed receiver. Although this latter order directed the payment of money by Kovacs to the receiver, the receivership was established for the

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[11] For other reasons, the Third Circuit was unable to find that the district court had abused its discretion in denying the preliminary injunction. 688 F.2d at 214.

limited purpose of implementing the cleanup order. Accordingly, this second order, directed to cleanup of the dumpsite, must be distinguished from a traditional money judgment.[12]

Remedial orders obtained under the endangerment provisions may require the expenditure of money either directly or indirectly. Nevertheless, such remedial orders are not designed to penalize defendants. Nor is their objective to compensate the government for harm or expenses incurred. They aim solely for public protection and effective enforcement of the environmental laws. As such, the government's efforts to enforce compliance should be exempt from the operation of the automatic stay provisions.

3. The decision below is at odds with the approach followed by the Fifth Circuit when it upheld an NLRB order that a bankrupt company reinstate two employees whom it had discriminatorily discharged. *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981) (per curiam). Unconcerned by the fact that a reinstatement order was tantamount to an order to commence paying wages, the court ruled that: "The crucial issue is whether the NLRB is a governmental unit and whether this action is one to enforce police or regulatory powers." 639 F.2d at 293.[13]

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[12] "A money judgment is one which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be transferred or restored. 2 Bouv. Law Dict. p. 2240." *U.S. Fidelity & Guaranty Co.* v. *Ft. Misery Highway Dist.*, 22 F.2d 369, 372 (9th Cir. 1927).

[13] The court declined to express an opinion as to whether the award of back pay was a money judgment or whether the bankruptcy court had the power to issue a discretionary stay under 11 U.S.C. 105(a), notwithstanding the exemption

Similarly, in a case closely analogous to *Kovacs* on its facts, the Commonwealth Court of Pennsylvania found the governmental action exempt from the stay. *Commonwealth* v. *Peggs Run Coal Co.*, 423 A.2d 765 (Commw. Ct. Pa. 1980). There, the Pennsylvania Department of Environmental Resources sued the owner of a coal mine and cleaning plant for alleged violations of various state environmental statutes. The complaint requested both a mandatory injunction ordering compliance with the laws and the posting of bonds to assure compliance with the injunction. The coal company, having filed a petition in bankruptcy, invoked the automatic stay provisions of the Bankruptcy Code to block the agency's action. After analyzing the legislative history (quoted at notes 5, 7, *supra*), the Pennsylvania court concluded that the agency was not attempting to enforce a money judgment. The court therefore held the proceeding exempt from the automatic stay.[14] 423 A.2d at 767.

Plainly enough, the Sixth Circuit followed a different path. It focused its attention exclusively on the ordered release of Kovacs' post-bankruptcy earnings to the receiver, ignoring the fact that the receivership was limited to cleaning up the dumpsite to protect public safety. In this, we submit, the court below fell into error.

4. The importance of the question is obvious. Automatic application of the stay to enforcement of orders like that involved here elevates the Bank-

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of the NLRB's action from the automatic stay. 639 F.2d at 293 & n.3.

[14] See also, *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D. P.R. 1979) (vacating bankruptcy court order that stayed enforcement of Clean Air Act regulations against debtor's quarry operations).

ruptcy Code over federal and state health safety laws, thus permitting and encouraging bankruptcy as an escape from the costs of environmental protection. Because of the great number of dumpsites urgently requiring cleanup and the limited funds available to state and federal governments for the purpose, any rule that insulates the responsible polluter has grave consequences.

The dimensions of the problem and the need for reasonably prompt solutions argue for clarification of the governing law by this Court without delay. In the circumstances, we urge the Court to review the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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